

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Regulated Industries Committee

BILL: CS/SB 1048

INTRODUCER: Regulated Industries Committee and Senator Baker

SUBJECT: Construction Bonds

DATE: March 3, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harrington	Imhof	RI	Fav/CS
2.	_____	_____	CA	_____
3.	_____	_____	JU	_____
4.	_____	_____	GA	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|-----------------------------------------|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This committee substitute (CS) requires a contractor who has obtained a payment bond under s. 255.05(1)(a), F.S., to record the bond in the Official Records in the county where the improvement is located. The CS prohibits the local issuing authority for a building permit from inspecting the improvement until the issuing authority has either a copy of the contractor's recorded payment bond on file or the contracting public entity has filed a notarized statement that the contract is exempt from the payment bond requirement.

The CS requires a contractor to provide an owner with a form called Owner's Rights and Responsibilities under Florida's Construction Lien Law and copies of the following five statutory forms: (1) notice of commencement; (2) release and waiver of lien upon progress payment; (3) release and waiver of lien upon final payment; (4) request for sworn statement of account; (5) and contractor's final payment affidavit. The Statement of an Owner's Rights and Responsibilities under Florida's Construction Lien Law is included in the CS. The CS also requires a copy of the Owner's Rights and Responsibilities under Florida's Construction Lien Law be signed by the owner and filed with the building permit application at the local permitting authority or the building permit application will not be processed.

The CS deletes the requirement that the construction lien law notice be included in the construction contract between contractor and owner.

The CS changes the date a Notice of Commencement expires from 1 year after the Notice of Commencement is filed to ninety days after the day of the final furnishing of all labor, services, and materials required by the direct contract. The CS also deletes the provision that states that a Notice of Commencement expires if work does not commence within 90 days.

The CS creates s. 713.137, F.S., which creates several new prerequisites to the inspection of improvements by local issuing authorities. The CS also creates several exceptions to the requirements created in s. 713.137, F.S.

The CS provides an effective date of October 1, 2010.

This CS amends the following sections of the Florida Statutes: 255.05, 713.015, 713.06, 713.09, 713.13, 713.135, 713.16, 713.18, 713.22, 713.23, and 713.24. This CS creates section 713.137, Florida Statutes.

II. Present Situation:

Payment Bonds for Public Projects

Section 255.05(1)(a), F.S., provides that any person who enters into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work is required to deliver to the public owner a payment and performance bond with a state authorized surety insurer. A payment bond guarantees that the contractor will pay certain subcontractors, laborers, and material suppliers associated with the project. A performance bond protects the owner from financial loss should the contractor fail to perform the contract in accordance with its terms and conditions.

The payment and performance bond must state on its front page:

- The name, principal business address, and phone number of the contractor, the surety, the owner of the property being improved, and, if different from the owner, the contracting public entity;
- The contract number assigned by the contracting public entity; and
- A description of the project sufficient to identify it, such as a legal description or the street address of the property being improved, and a general description of the improvement.¹

A construction lien is an equitable device, designed to protect those enhancing an owner's property who are not in direct privity with the owner,² such as laborers and suppliers of material,

¹ Section 255.05(1)(a), F.S.

² *Hiers v. Thomas*, 458 So.2d 322 (Fla. 2nd DCA 1984).

who remain unpaid while the owner pays the contractor directly.³ Under current law, contractors cannot place a lien on public or state owned lands or buildings to secure payments for construction performed on the public buildings or public lands. Section 255.05, F.S., provides for payment or performance bonds as an alternative to filing a lien to secure payment for work done by contractors on publicly owned land. A payment bond is required for a state project that is more than \$100,000 unless the project is between \$100,000 and \$200,000, and then a state agency can exempt the contractor from the bond requirement.⁴

Section 255.05(2), F.S., provides procedures for subcontractors and suppliers to make claims against a payment bond. This section also provides an outline for a notice form, deadlines for action, and consequences for improper notice or failure to act within specified guidelines. Section 255.05(2)(a)2., F.S., provides that a claimant on a payment bond must give a contractor notice that he or she intends to make a claim against the bond for payment. A claimant who is not in privity with the contractor and who has not received payment for his or her labor, services, or materials must give the contractor and surety written notice of the performance and of the nonpayment.⁵

Florida Construction Lien Law

As noted above, a construction lien⁶ is an equitable device designed to protect subcontractors, sub-subcontractors, laborers and suppliers of material who remain unpaid after the owner has paid the contractor directly.⁷ The lien law protects subcontractors, sub-subcontractors, laborers, and suppliers of materials by allowing them to place a lien to ensure payment on the property receiving their services. Another purpose of lien law is to protect owners by requiring subcontractors to provide a notice of possible liens, thereby preventing double payments to contractors and subcontractors, material suppliers, or laborers for the same services or materials.

Construction lien statutes set forth a right of action that did not exist at common law, and thus construction liens are purely statutory.

Part I of ch. 713, F.S., requires various notices, demands and requests to be provided in writing to the homeowner, contractor, subcontractor, lender, and building officials. It requires that the notices, demands and requests be in a statutory form. The following notices are complicated but important for the homeowner to understand during this process: Notice of Commencement, Notice to Owner, Claim of Lien, Notice of Termination, Waiver and Release of Lien, Notice of Contest of Lien, Contractor's Final Payment Affidavit, and Demands of Written Statement of Account. The procedure that a homeowner follows in paying for improvements under part I of

³ *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623 (Fla. 1995).

⁴ The authority to exempt is delegated to the state agency by the Secretary of the Department of Management Services. Section 255.05(1)(a), F.S.

⁵ Section 255.05(2)(a)2., F.S.

⁶ Lien is not defined in ch. 713, F.S., but can be found elsewhere in the Florida Statutes to mean "a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien." Sections 726.102(8) and 727.103(9), F.S.

⁷ *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623 (Fla. 1995).

ch. 713, F.S., determines whether a payment is proper or improper.⁸ An improper payment could result in the homeowner paying twice for the same improvement.⁹

Homeowner Education

There are several ways in which homeowners receive information about the Florida Construction Lien Law. The current statutory process requires three different notifications to the homeowner from three different parties: the county or city building officials, the lender, and the contractor. The purpose of these notifications is to educate the homeowner about the lien law before a lien can take effect. The order in which the notices are required mirrors the process of building a house. Under most circumstances the contractor is the first to have contact with the homeowner, followed by the building officials or the lender.

Contractor

Under s. 713.015, F.S., the contractor is required to include in the contract with the homeowner this warning regarding the lien law:

According to Florida's Construction Lien Law (sections 713.001-713.37, Florida Statutes), those who work on your property or provide materials and services and are not paid in full have a right to enforce their claim for payment against your property. This claim is known as a construction lien. If your contractor or a subcontractor fails to pay subcontractors, sub-subcontractors, or material suppliers, those people who are owed money may look to your property for payment, even if you have already paid your contractor in full. If you fail to pay your contractor, your contractor may also have a lien on your property. This means if a lien is filed your property could be sold against your will to pay for labor, materials, or other services your contractor or subcontractor may have failed to pay. To protect yourself, you should stipulate in this contract that before any payment is made, your contractor is required to provide you with a written release of lien from any person or company that has provided you a "Notice to Owner." Florida's Construction Lien Law is complex and it is recommended that you consult an attorney.

The warning must be printed in no less than 12-point font, capitalized, and in boldface type on the front page of the contract or in a separate page.¹⁰ The owner must sign and date the section of the contract that includes this notice. The delivery and initial explanation of this information is

⁸ An improper payment is a payment made by a homeowner to a contractor that does not fall within the proper payment defense to a lien under s. 713.06(3), F.S. Improper payments can occur if the homeowner fails to file a Notice of Commencement or fails to obtain a release or waiver of lien after receiving a notice to owner and paying the subcontractor.

⁹ The procedure that a homeowner follows in paying for improvements under ch. 713, pt. I, F.S., determines whether a payment is proper or improper. Making a payment that is improper could result in the homeowner paying twice for the same improvement because the payment is not credited against the owners' potential liability for payment of liens. See Fred R. Dudley, *Florida Construction Liens: Representing the Residential Owner*, 79 Fla. Bar J. 34 (Dec. 2005). See also *Review of the Florida Construction Lien Law*, Interim Report No. 2009-124, Florida Senate Committee on Regulated Industries, October 2008.

¹⁰ Section 713.015(1), F.S.

dependent on the contractor; this initial explanation is typically when the homeowner would have their first contact with any information regarding the lien law.

Building Officials

Under s. 713.135, F.S., when a person applies for a building permit, the county or city that issues the building permit (building officials) must furnish the applicant and the owner of the property with an explanation of the lien law that is provided by the Department of Business and Professional Regulation (department).¹¹ The most common method of delivering this information is by mail, but the building officials have the option of electronic mail, facsimile, or personal delivery.¹²

Lenders

The third party that is required to give a notice of the construction lien law is the lender. Section 713.3471(1), F.S., requires the lender, prior to making a loan disbursement on a residential construction loan directly to the owner, to send the owner a notice. The notice warns the owner that the disbursement is directly to him or her and that, to protect against paying twice, the homeowner needs to require the contractor to give the homeowner lien releases from each lienor who has sent the homeowner a Notice to Owner each time they make a payment to the contractor.

Notice of Commencement

Section 713.13, F.S., provides that the recording of a Notice of Commencement (NOC) gives constructive notice that claims of lien may be recorded and will have priority over any conveyance, encumbrance, or demand not recorded against the real property prior to the time the notice is recorded. However, any conveyance, encumbrance, or demand recorded prior to the time the notice is recorded and any proceeds thereof regardless of when disbursed, shall have priority over liens.

The NOC must be recorded with the clerk of the court where the property is located by the owner or the owner's agent before a contractor actually begins an improvement to real property or recommences completion of any improvement after default or abandonment. A certified copy of the recorded notice or a notarized statement of filing and a copy must be posted at the jobsite. The NOC must include the legal description of the property, the street address and the tax folio number, if available. It must also include a general description of the improvement, the name and address of the owner, the name and address of the contractor, the name and address of any person designated to receive notices, and the anticipated expiration date if different from one year. The form for the NOC is provided in s. 713.13(1)(d), F.S.

For contracts greater than \$2,500, the applicant for the building permit must file a certified copy of the recorded notice or a notarized statement of filing and a copy with the building permit

¹¹ See http://www.myflorida.com/dbpr/pro/cilb/documents/florida_lien_law.pdf for a copy of the DBPR explanation of the Florida Construction Lien Law (Last visited 02/24/10).

¹² Section 713.135(1)(b), F.S.

authority. The notice must be filed before the first inspection or the property will not be inspected.¹³

A NOC is specifically not required prior to issuing a building permit.¹⁴ The building permit must include a 12-point capitalized warning regarding the necessity of filing a NOC.¹⁵ All liens from persons who do work to improve a property relate back to the filing of the NOC.¹⁶

The NOC is valid for 1 year, unless otherwise stated in the notice. Any payments made by the owner after the expiration of the NOC are considered to be improper payments.¹⁷ If the improvement described in the NOC is not commenced within 90 days of the recording of the notice, then the notice is “void and of no further effect” which results in any payments after that time also being improper.¹⁸

Demand for Copy of Contract and Statements of Account

Section 713.16, F.S., provides that a copy of the contract of a lienor or owner and a statement of the amount due or to become due must be furnished to any party, upon written demand. The person demanding the documents must pay for the reproduction.¹⁹ A request for a sworn statement of account must be in a statutory form.²⁰ The failure to provide the information within 30 days after the demand may result in the loss of the owner’s right to recover attorney fees or the lienor’s loss of lien.²¹

Service

Section 713.18(1), F.S., provides that service of notices, claims of lien, affidavits, assignments, and other instruments must be served by personal service, registered or certified mail, overnight or second-day mail, or by posting on the premise if the other types of service cannot be accomplished.

III. Effect of Proposed Changes:

Payment Bonds for Public Projects

The CS amends s. 255.05(1), F.S., to require the contractor who is issued a payment bond for the public construction project to record the payment bond in the public records of the county in which the improvement is located. The CS requires that the bond must state on its front page the bond number assigned by the surety. The CS also prohibits the local issuing authority from inspecting the improvement until the issuing authority has a recorded payment bond on file or

¹³ Section 713.135(1)(d), F.S. However, for a direct contract to repair or replace an existing heating or air conditioning system, the threshold is contracts greater than \$7,500.

¹⁴ Section 713.135(1)(d) and (e), F.S.

¹⁵ Section 713.135(1)(a), F.S.

¹⁶ Section 713.07(2), F.S.

¹⁷ Section 713(1)(c), F.S.

¹⁸ Section 713.13(2), F.S.

¹⁹ Section 713.16(1), F.S.

²⁰ Section 713.16(3), F.S.

²¹ See Sections 713.16(3) and (5), F.S.

the contracting public entity has filed a notarized statement stating that the contract is exempt from the requirement for a payment bond. The CS exempts installation of temporary electrical service or other temporary utility service, land clearing, or other preliminary site work from this requirement.

Florida Construction Lien Law

The CS substantially amends the way in which an owner receives information regarding the mechanics and effects of the construction lien law. The effect of this CS would have the majority of the information regarding the construction lien law given to the owner at the beginning of the construction process. The CS creates a new form called Owner's Rights and Responsibilities under Florida's Construction Lien Law. The form gives step by step instructions regarding the construction lien law.

The Owner's Rights and Responsibilities under Florida's Construction Lien Law provide information on the construction lien law and elaborate a four step process to help the owner. The form includes four steps as follows:

- Step 1: Information about the Notice of Commencement
- Step 2: Information about monitoring important notices that the homeowner receives
- Step 3: Information about obtaining waivers each time the homeowner pays the contractor
- Step 4: Information about obtaining a contractor's final payment affidavit

The statement also gives additional information about the hiring of a licensed contractor, caution when paying large deposits, consulting legal advice when necessary, and contact information regarding the Florida Homeowners' Construction Recovery Fund and the Construction Industry Licensing Board. The statement also includes copies of a Notice of Commencement, a Waiver and Release of Lien upon Progress Payment, a Waiver and Release of Lien upon Final Payment, a Request for Sworn Statement of Account, and a Contractor's Final Payment Affidavit.

The CS provides that a contractor must provide the Owner's Rights and Responsibilities under Florida's Construction Lien Law form to the owner for every direct contract related to improvements to real property. The owner must sign this form and the form must be turned in with the building permit application to the local permitting authority.

The CS deletes the requirement in s. 713.015(1), F.S. that a contractor include a statutory warning in every direct contract between the contractor and home owner. This warning has been replaced by the requirement that the contractor deliver the General Statement of an Owner's Rights and Responsibilities under Florida's Construction Lien Law.

The CS amends the notice requirements for proper payment for liens of persons not in privity with the owner. The CS requires the contractor to include in his notice that the homeowner should require a written waiver and release of lien from the subcontractor to protect against liens. The notice refers the owner back to the General Statement of Owner's Rights and Responsibilities for more information.

The CS amends s. 713.13(1)(c), F.S. to change the expiration of the Notice of Commencement from 1 year, or the amount of time specified by the homeowner, to 90 days after the day of final furnishing of all labor, services, and materials required by the direct contract, including any change orders, or on the effective date of the Notice of Termination. This change would eliminate the need to enter any period of time greater than 1 year on the Notice of Commencement or to file an amended Notice of Commencement if the construction takes longer than 1 year or more than the specified amount of time on the original Notice of Commencement. This change could help the homeowner avoid making improper payments because he or she did not amend the Notice of Commencement when the specified time expired. The CS deletes the provision that provides that the Notice of Commencement would expire if construction did not begin within 90 days. The CS deletes the provision that provides that any payments made after the expiration of the Notice of Commencement are improper.

The CS also amends the warning regarding the expiration of the Notice of Commencement in the statutory Notice of Commencement form in s. 713.13(1)(d), F.S. to reflect the change of the expiration from 1 year to 90 days after the final furnishing of all labor, services, and materials required by the contract. The CS also amends the notice to delete the warning that any payments made by the owner after the expiration are considered improper.

The CS amends s. 713.135(1), F.S., to require the authority issuing the building permit to require the applicant to submit the signed and dated general statement of owner's rights and responsibilities under Florida's Construction Lien Law prior to processing a building permit request. The CS requires that the warning to owner on the permit must include a statement that the contractor's payment bond, if the project is bonded, must be recorded and posted at the job site. The CS requires the local permitting authority to make available copies of the general statement of an owner's rights and responsibilities under Florida's Lien Law and deletes the requirement that the local permitting authority provide the applicant with a printed statement warning the owner of the effects of the construction lien law.

The CS creates s. 713.137, F.S., to list the prerequisites for inspection of improvements. The CS requires that:

- The issuing authority have a signed copy by the homeowner of the general statement of an Owner's Rights and Responsibilities under Florida's Construction Lien Law;
- The issuing authority have a copy of the contractor's recorded payment bond or a notarized statement of the contractor or owner stating that a payment bond was not required; and
- The issuing authority have a copy of the Notice of Commencement or a notarized statement that the notice has been filed for recording and the information in the notice is consistent with the building permit application, complete, and legible.

The CS provides the following exceptions to the prerequisites to inspection:

- The installation of temporary electrical service or other temporary utility service, land service or other preliminary site work;
- Repair of or replacement of a heating or air-conditioning system or solar hot water system pursuant to a direct contract in the amount of \$7,500 or less; and

- For improvements pursuant to a direct contract in an amount of \$5,000 or less.

The CS amends s. 713.16, F.S., to require that the demand for a copy of contract and statement of account include the description of the project, including the names of the owner, the contractor, and the lienor's customer, sufficient for the lienor to properly identify the account in question.

The CS amends s. 713.18, F.S., to include additional means for serving notice. The new means of delivery include global express. The CS provides that incomplete address information may be completed and formatted according to the United States Postal Service addressing standards without affecting the validity of service.

The CS also contains amendments to conform the provisions to current bill drafting conventions.

The CS shall take effect on October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The CS requires the contractor to provide a detailed explanation of the Florida Lien Law to the homeowner upfront, at the signing of the contract. Providing the information to the homeowner at the beginning of the construction process ensures that the homeowner has the information necessary to protect against liens and to better understand the process. As a result, contractors may incur some additional costs in altering their contracts and supporting documents.

The CS changes the expiration of the Notice of Commencement. Under current statute, the Notice of Commencement expires 1 year after the Notice of Commencement is filed or the specified amount of time on the notice. The CS changes the expiration to 90 days

after the final furnishing of all labor, services, and materials required by the direct contract, including any change orders or on the effective date of the Notice of Termination. The CS deletes the provision that provides that the Notice of Commencement expires if construction does not begin within 90 days. The CS also deletes the provision that provides that payments made after the expiration of the Notice of Commencement are improper. These changes could help homeowners avoid improper payments because of the expiration of the Notice of Commencement.

C. **Government Sector Impact:**

The local permitting authority may experience a reduction in expenses related to homeowner education as the bulk of that responsibility would fall on the contractor.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on March 3, 2010:

The CS requires the contractor who is issued a payment bond to record the payment bond in the Official Records for the county in which the improvement is located.

The CS deleted s. 13 from the bill, which contained changes to s. 713.29, F.S., pertaining to attorney fees.

The CS changed the effective date to October 1, 2010.

B. **Amendments:**

None.